REDACTED – FOR PUBLIC INSPECTION

The voice of mid-size communications companies

June 28, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers*; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 05-25, RM-10593

Dear Ms. Dortch:

In accordance with the *Special Access Data Collection Protective Order* in WC Docket No. 05-25 and RM-10593,[1] and the *Special Access Modified Protective Order* and *Special Access Second Protective Order* in WC Docket No. 05-25 and RM-10593[2] (collectively, the Protective Orders), ITTA – The Voice of Mid-Size Communications Companies hereby submits the **Redacted** version of its comments in the above-captioned proceedings.[3]

Pursuant to the Protective Orders and directions from Bureau staff, ITTA submitted in paper form the original and two copies of its Highly Confidential comments for filing, and provided one hard copy and one password-protected CD-ROM copy of its Highly Confidential comments under separate cover to Christopher Koves, Esq. in the Bureau.

[1] *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Data Collection Protective Order, 29 FCC Rcd 11657 (WCB 2014).

[2] *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Modified Protective Order, 25 FCC Rcd 15168 (WCB 2010); Second Protective Order, 25 FCC Rcd 17725 (WCB 2010).

[3] In an order released on June 24, the Wireline Competition Bureau (Bureau) extended the procedures for submitting and accessing Confidential Information, adopted in the business data services protective orders in WC Docket No. 05-25, to Confidential Information filed in the record in WC Docket No. 16-143. *See Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Order, DA 16-722 (WCB June 24, 2016). It is ITTA's understanding that this order likewise applies to Highly Confidential Information.

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Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

Michael J. Jacobs
Vice President, Regulatory Affairs

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

COMMENTS OF
ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

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June 28, 2016

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COMMENTS OF ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

ITTA – The Voice of Mid-Size Communications Companies ("ITTA") hereby submits its comments in response to the Federal Communications Commission's Further Notice of Proposed Rulemaking proposing a new regulatory framework for business data services.[1]

I. INTRODUCTION AND SUMMARY

The members of ITTA are mid-size communications companies that provide a broad range of high-quality broadband, wireline and wireless voice, video, and other communications services on a wholesale and resale basis to residential and business customers in predominantly rural areas across 45 states. A number of ITTA's members have price cap incumbent LEC operations.

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[1] *Business Data Services in an Internet Protocol Environment et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 (2016) (*FNPRM*).

Many of the *FNPRM*'s proposals, if adopted, will force ITTA's members to slam the brakes on their continued investment in broadband facilities and services, especially in rural communities. Rather than removing barriers to the transition to the networks of tomorrow – an avowed goal of the *FNPRM*[2] – many of the *FNPRM*'s proposals threaten to freeze providers in the technology and deployment of the past. Turning the clock back on rural consumers in this manner clearly would contravene the public interest.

ITTA maintains that the Commission should establish a higher threshold for regulating business data services rates than the proposals contained in the *FNPRM*. ITTA agrees with the Commission that any new regulatory framework must be technology-neutral. Consistent with the goal of a technology-neutral framework, the bar for any competitive market test triggering a finding that a market is not competitive should be set high *both* for TDM services and packet-based services, especially given the adjunct goal of this proceeding to promote technology transitions to new, IP-based, packet-switched communications. Such a finding should not apply where there are two or more providers in a geographic market or one provider as well as a potential competitor. Going forward, the Commission must adopt a framework that properly accounts for both actual and potential competition and lifts regulation where there are indicia of sufficient demand to warrant competitive provision of services.

ITTA recognizes that, just yesterday, Verizon and INCOMPAS jointly filed a letter with their own "outline" for a new regulatory framework for business data services.[3] Contrary to their

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[2] *See FNPRM*, 31 FCC Rcd at 4726, para. 7.

[3] Letter from Kathleen Grillo, Senior Vice President, Verizon, and Chip Pickering, CEO, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 and 05-25, at 1 (filed June 27, 2016).

claim that their proposal represents a "middle ground between many different perspectives,"[4] their proposal is wildly imbalanced, suggesting a framework to piggyback at below-cost rates on infrastructure financed and built by ITTA's members and other incumbent LECs. The Commission should ignore the letter, which amounts to nothing more than an attempt to distract the Commission from evaluating today's comments with an objective eye, and further evinces Verizon's continually evolving abandonment of its wireline business in favor of its wireless operations.

II. THE *FNPRM* FAILS TO RECOGNIZE CURRENT MARKETPLACE CONDITIONS

A. The Commission Should Moderate its Pace in Reaching Final Decisions in this Proceeding

By the Commission's own recognition, the dataset submitted by service providers last year,[5] representing data from 2013, "likely represents the most comprehensive collection of information ever assembled for a Commission rulemaking proceeding."[6] And yet, it turns out that dataset was woefully incomplete until just a few weeks ago – well over a month after the *FNPRM* was released -- undercounting cable business data services to such a degree as to render all analyses of the dataset, and the *FNPRM* inextricably reliant both on the dataset and on such

[4] *Id.* at 3.

[5] *See Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012); Report and Order, 28 FCC Rcd 13189 (2013).

[6] *FNPRM*, 31 FCC Rcd at 4742, para. 43.

analyses, fatally flawed.[7] This reason alone necessitates the Commission re-grouping and seeking comment on reevaluated proposals.

Notwithstanding this fatal flaw, the Commission assures that it "intends to listen and to learn before it reaches final decisions."[8] It is hard to imagine how the Commission will be able to do so with the clock ticking so loudly. It is virtually inconceivable how Commission staff will be able to parse through this inevitably mammoth record (where the comment cycle closes July 26), listen, learn, internally propose final decisions, draft an undoubtedly voluminous order, and present it to the Commissioners for consideration and vote by the "end of the year"[9] (or sooner). Two adages leap to mind: "something's gotta give" and "haste makes waste." With stakes this high concerning a $45 billion per year industry, and with proposals so complex,[10] the Commission needs to ease off the throttle, give interested parties a legally adequate amount of

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[7] The Commission has not yet ruled on a comprehensive Motion to Strike detailing the "gargantuan" gap between the dataset now and as it stood at the time analyses of it were performed and the *FNPRM* was written. *See generally* Motion to Strike, WC Docket No. 16-143 et al. (filed June 17, 2016) (Motion to Strike). As the Motion to Strike asserts, failure by the Commission to revamp its proposed rules would deny parties due process of law, and any resulting rules would be arbitrary and capricious. *See, e.g., id.* at 3.

Notably, the IRW White Paper *did*, however, reflect extensive cable deployment not accounted for by other analyses. *See* Drs. Mark Israel, Daniel Rubinfeld and Glenn Woroch, Competitive Analysis of the FCC's Special Access Data Collection (filed Jan. 28, 2016) (IRW White Paper). Therefore, if the Commission does still plow ahead to an order in this proceeding in the unreasonable timeframe publicly announced, it should accord particular weight to the IRW White Paper, both due to its substantive merits as well as the integrity of its underlying data. *Cf.* Motion to Strike at 1-2 n.2 (arguing why solely the IRW White Paper need not be stricken from the record).

[8] *FNPRM*, 31 FCC Rcd at 4728, para. 6.

[9] *Id.* at 5001, Statement of Chairman Tom Wheeler (Wheeler FNPRM Statement).

[10] *See, e.g., FNPRM*, 31 FCC Rcd at 5002, Statement of Commissioner Mignon L. Clyburn ("I must confess to being concerned about the complexity of some aspects of the [*FNPRM*], and how feasible it will be for the agency as well as for the entities that provision the facilities and providers that purchase these services to administer").

time to consider the complete dataset,[11] and give itself reasonable time to craft a new regulatory framework with due attention and care.

B. The Data Collection Upon Which the *FNPRM* Relies is Out-of-Date and Does Not Represent Current Marketplace Competitiveness

In the *FNPRM*, the Commission claims to be taking a "forward-looking view of technological and market changes."[12] Unfortunately, while the 2013 data collected by the FCC is a start, it does not paint a full or accurate picture of the vibrantly competitive business data services marketplace borne from the growth and proliferation of cable and competitive LEC competition in just the past two-and-a-half years. Significant competition has developed during that time, particularly due to the explosive growth of Ethernet services offered by incumbents and competitors alike.

The most significant growth has been from the cable sector, which has invested billions of dollars to expand its business model to include provision of high-capacity services in the enterprise marketplace. It is widely recognized that "[c]able is the fastest growing segment in the wholesale and retail business Ethernet markets."[13] As Vertical Systems Group reports, "[t]he Cable MSO segment remained the fastest growing overall in 2014, garnering growth that considerably outpaced the Incumbent Carrier and Competitive Provider segments… Already established in metro markets, leading cable companies are fortifying their Ethernet offerings to

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[11] *See* Motion to Strike.

[12] *FNPRM*, 31 FCC Rcd at 4803, para. 81.

[13] *See, e.g.*, Sean Buckley, Cable Hones Its Wholesale Skills in Special Access, Wireless Backhaul, Fierce Telecom (Apr. 7, 2015), http://www.fiercetelecom.com/special-reports/cable-hones-its-wholesale-skills-special-access-wireless-backhaul.

meet the needs of larger businesses with regional and nationwide networks."[14] In the past two years, "cable operators have increased the penetration of business locations they serve by more than 50 percent while ILEC penetration dipped nearly 14 percent."[15] As cable television subscriptions among residential customers decline, the incumbent cable industry now views the enterprise services market as a key area for future growth.[16]

The Commission in all likelihood will maintain its defense of relying on the 2013 data.[17] Regardless, even with the inherent limitations of that data, the Commission itself identifies a likely 75% increase in cable business data services from 2013-2016.[18] Notwithstanding that acknowledgement, however, the cable business data services revenue figures estimated by the Commission – which, for example, would amount to approximately $3 billion for 2015 – woefully underestimate those calculated by industry, which presented a cable business services revenue figure of $14 billion for 2015.[19] Indeed, the industry figures show cable business data

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[14] Vertical Systems Group, 2014 U.S. Cable MSO Ethernet LEADERBOARD (Mar. 16, 2015), http://www.verticalsystems.com/vsglb/2014-u-s-cable-mso-ethernet-leaderboard/.

[15] Sean Buckley, Cable Operators Taking Greater Share of Large Businesses, Says Analyst Firm, Fierce Telecom (Sept. 21, 2015), http://www.fiercetelecom.com/story/cable-operators-takinggreater-share-large-businesses-says-analyst-firm/2015-09-21.

[16] *See, e.g.*, Alan Breznick, *Cable Gives Thanks for Business Services*, Light Reading (Nov. 27, 2015), http://www.lightreading.com/cable/cable-business-services/cable-gives-thanks-forbusiness-services/a/d-id/719564 ("Cable operators are increasingly relying on commercial services for revenue growth as their residential video revenues flatten out and their residential broadband business faces fresh competitive and regulatory challenges."); Mari Silbey, *Moffett: Business Services Critical to Cable Growth*, Light Reading (Dec. 1, 2015), http://www.lightreading.com/cable/cable-business-services/moffett-business-services-critical-tocable-growth/d/d-id/719612 ("In the near-term future, business services will be increasingly critical to cable's continued success.").

[17] *See FNPRM*, 31 FCC Rcd at 4832-36, paras. 245-55.

[18] *See FNPRM*, 31 FCC Rcd at 4819, para. 218.

[19] *See id.* at 4833, para. 246 (citing USTelecom Comments in WC Docket No. 05-25, RM-10593, at 24-25 (filed Jan. 28, 2016)).

services revenue having been $3.3 billion in 2008, *eight* years before the Commission would project a "close to" $3.5 billion figure.[20] The expansive growth in cable business data services over the past several years, as evidenced by the industry revenue figures, leads to the inescapable conclusion that the 2013 data cannot be relied upon to measure the level of competition in the business data services market that exists today.

And, of course, the *coup de grâce* is that even the stale data presented to the Commission was bereft, until only recently, of critical data reflecting the extent of 2013 deployment of competitive cable Ethernet. As the Motion to Strike demonstrates convincingly, basing proposals on the incomplete dataset and analyses the Commission had at its disposal when writing the *FNPRM* was arbitrary and capricious.[21]

C. The Commission Must Recognize a Market as Competitive When Two Providers are Capable of Serving It

1. The Commission Must Account for Potential Competition

The Commission must acknowledge that potential competition matters in assessing the business data services market's competitiveness. A provider should not be imputed with market power merely because a would-be competitor has made the business decision to only cherry-pick high-density locations or not actually deploy to a particular location until it already has threshold customer commitments. This conclusion is well-rooted in empirical observation, economic theory, and legal authorities and precedent.

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[20] *See* USTelecom, *The Competitive Business Broadband Marketplace* at 6 (Feb. 2016), https://www.ustelecom.org/sites/default/files/files/USTelecom-White-Paper-2.pdf.

[21] *See* Motion to Strike.

As the Commission observes, "potential competition, appropriately defined, is important."[22] Dr. Marc Rysman, the econometrician engaged by the Commission, finds, in studying the Commission's collected data, competitive effects of potential competition.[23] The Commission further describes how, often, non-cable operators make business decisions whether or not to compete in a market irrespective of purported incumbent LEC market power or barriers to entry, but rather based on demand concentration or customer commitments.[24] Moreover, there is evidence in the record that non-cable, competitive providers sometimes nevertheless do build out to buildings with relatively low demand, and, in any event, the costs of doing so can be minimal.[25] As for cable providers, NCTA proclaimed that today, "'[v]irtually any area with special access demand will contain cable company facilities that serve, or are capable of serving, business customers.'"[26]

Economic theory also solidly supports accounting for potential competition. As the IRW White Paper explains, "investment in facilities required to deliver service is an especially informative measure of competition," because, among other things, such "durable commitments" reflect sunk investments, "ensur[ing] that the provider has an economic incentive to service the

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[22] *FNPRM*, 31 FCC Rcd at 4829, para. 235.

[23] *Id.* at 4794, 4943, para. 165, Appx. B, Dr. Marc Rysman, Empirics of Business Data Services (Apr. 2016), at Sec. V (Rysman White Paper). *See also, e.g., id.* 4792, 4923, para. 165, Rysman White Paper at Sec. I ("we see some effects of competitive fiber in the census block, even if that fiber is not connected to any buildings in the block").

[24] *See id.* at 4747, paras. 54-55.

[25] *Id.* at 4829. Para. 235 n.633 ("AT&T notes that 'evidence submitted by the competitive providers indicates that the revenues required to justify the cost of extending fiber to a nearby building are modest [and] competitive providers can and do extend fiber to even buildings with relatively low demand.'").

[26] *Id.* at 4805, para. 189 n.485 (quoting NCTA Reply in WC Docket No. 05-25, RM-10593, at 14 (filed Feb. 19, 2016) (NCTA Reply)).

market in the short run and over the longer run."[27] More importantly, because "the reach of an embedded network can extend beyond the location of its current connections to serve additional customers in the immediate vicinity," sunk investment also facilitates expansion of the provider's service area with minimal additional cost.[28]

Business data services competition does not occur only among providers that already have an existing connection to a building. Additional providers with the ability to deploy a connection – based on, for example, a large fiber ring or transport facilities that are near the building – also vigorously compete for the business of the building's business data services customers. Therefore, as the Department of Justice has found, business data services competition from competitive LECs constrains incumbent LEC prices in any building that is sufficiently near, but not necessarily already connected to, their sunk network facilities.[29] Competitors deploy networks that are within reach of all or most of the concentrated demand within a given metropolitan area. The competitor will then market its service broadly throughout the geographic area, and it will provide service to customers on demand, where it believes it is likely to earn a profit from doing so. The economic consideration is not limited solely to the revenues from the customer at hand, at a given building or location, but may also include the economic opportunities from adjacent locations within that same vicinity. Once facilities have

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[27] IRW White Paper at 6-7.

[28] *Id.* at 10.

[29] *See, e.g., AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5682-83, 5685, paras. 41-42, 46 & nn.111-14 (2007) (describing and adopting "screens" employed by DOJ to determine whether a building could be served by alternative facilities, which recognize that competitors with facilities near a building can and do compete for customers in that building).

been deployed to a location, they can typically be used to serve many adjacent locations at a much lower marginal cost.[30]

Finally, legal precedent and authorities support accounting for potential competition. Indeed, the U.S. Court of Appeals for the D.C. Circuit observed that "the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed" because "that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market."[31] The Department of Justice and Federal Trade Commission Merger Guidelines also acknowledge that market competitiveness may be found to exist where there is potential competition.[32]

To loosely paraphrase Kevin Costner's character in *Field of Dreams*, "if you choose to build out, they will come." Potential competition is a meaningful factor in assessing competitiveness in business data services markets.

2. The Commission Should Take Into Account Best Efforts Cable Broadband Services

The Commission must take into account best efforts business class broadband services that cable operators provide. Such services are widely available and are marketed by providers

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[30] *See, e.g.*, Simon Flannery & Lisa Lam, Morgan Stanley, Level 3 Communications, Inc. 3Q13 Preview: Enterprise Growth and Ongoing Cost Initiatives Are Key Focuses (Oct. 28, 2013), at 3 (observing that because Level 3 already has extensive fiber networks in place, "the cost [for Level 3] to add fiber to a new building is fairly low relative to [its] peers").

[31] *WorldCom v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001).

[32] *Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010* § 5.1 (*Horizontal Merger Guidelines*) (Firms that have sunk investments and "that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact . . . without incurring significant [additional] sunk costs, are also considered market participants").

as a substitute to traditional incumbent LEC business data services. Moreover, best efforts broadband services are increasingly viewed by customers, particularly small businesses, as a viable substitute for incumbent LEC business data services.

Due to the ubiquitous nature of incumbent cable networks, cable broadband services are the most widely available and used form of broadband in the United States.[33] According to industry analysts, cable broadband networks pass more than three quarters of small and medium business customers in the U.S.[34] Cable providers market best efforts business broadband services as competitive alternatives to incumbent LEC business data services, especially lower-end services like DS1. Comcast, for example, states that "[w]ith speeds 64x faster than T1, advanced security, and dedicated national support, Business Internet provides the bandwidth, reliability and scalability your organization needs to help you be more competitive and successful."[35]

Insofar as the Commission expresses its "belief[]" that best efforts services do not appear to be competitive substitutes for business data services,[36] such a view is misplaced. The Commission's sweeping definition of "best efforts" service – "typically an asymmetrical service . . . shared among multiple users absent service guarantees, and is subject to failure during high

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[33] NCTA, *Broadband by the Numbers*, https://www.ncta.com/broadand-by-the-numbers ("As the nation's largest broadband provider, cable's fiber-rich networks are available to 93 percent of U.S. homes.").

[34] Alan Breznick, Heavy Reading, Presentation to The Future of Cable Business Services 2014 (Dec. 2, 2014) ("Cable industry's HFC lines already passed more than three quarters of SMBs in the U.S.").

[35] Comcast Corporation, *Business Internet for Branch Offices*, http://business.comcast.com/ethernet/products/internet-for-branch-offices (last visited June 26, 2016).

[36] *FNPRM*, 31 FCC Rcd at 4791, para. 160.

congestion periods"[37] – does not typify the characteristics of lower-cost cable offerings. Such offerings may include high-bandwidth – up to 100 Mbps – services that rival incumbent LECs' dedicated Ethernet's bandwidth capabilities at a much cheaper price.[38] Cable providers are also individually negotiating Service Level Agreements, guaranteeing specified repair intervals and availability, in the context of such offerings.[39]

Verizon depicts how cable providers offer business customers lower-cost alternatives to incumbent LEC business data services, and such business customers add easily obtainable equipment to create virtual private networks that ensure customers' traffic is not intermingled with other traffic over the global Internet.[40] In fact, CenturyLink was told by a customer that customers see lower-cost cable business data services as viable alternatives to incumbent LEC Ethernet services when making purchasing decisions primarily based on price.[41]

In addition, as noted in the Motion to Strike, the vast majority of what was reported to be "best efforts" cable business services from 2013 turns out, based on the missing cable industry data recently submitted into the record, to actually be cable Ethernet service – indisputably a competitor to incumbent LEC business data services.[42]

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[37] *Id.* at 4728, para. 14; *see also id.* at 4806-09, paras. 191-95.

[38] Letter from Maggie McCready, Vice-President – Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 15-147 and 05-25, RM-10593, at 3 (filed Mar. 1, 2016) (Verizon Mar. 1, 2016 Letter); *see also* Cox Communications, *Cox Business Internet* at 2, http://www.coxbusiness.com/meet/oc/sheila/pdfs/CBI%20Data%20Sheet.pdf.

[39] *See* Verizon Mar. 1, 2016 Letter.

[40] *See id.*

[41] *See* CenturyLink Reply Comments, WC Docket No. 05-25, RM-10593, Exh. 1, Declaration of Julie Brown and David Williams at para. 8 (filed Feb. 19, 2016).

[42] *See* Motion to Strike at 1-2.

Thus, whether offering services with comparable features to those offered by incumbent LECs, or alternative services at a more attractive price point, "best efforts" cable business data services are viewed by business data services customers as substitutes. As the Commission has held, "[w]hen one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical."[43]

3. The Commission Should Take Into Account High-Capacity Unbundled Network Elements

While cautioning that unbundled network element (UNE)-based competition may be subject to regulatory or other limits,[44] the Commission states that "[o]btaining UNEs often is the most economical way to reach a new customer for a competitive LEC, and it is important to account for the effects of UNE competition."[45] ITTA agrees. As Dr. Rysman shows, competitive providers have connections to 20 percent of all locations through UNE lines.[46] Thus, UNEs remain a competitive market force. In addition, such a finding falls squarely within prior Commission pronouncements. For instance, the Commission observed in the *Triennial Review Remand Order* that the availability of UNEs "is itself a check on special access

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[43] *Application of Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors) and Echostar Communications Corp. (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, 20606, para. 106 (2002) (citing *Horizontal Merger Guidelines* § 4).

[44] *FNPRM*, 31 FCC Rcd at 4825, para. 228; *see also id.* at 4748, para. 57.

[45] *Id.* at 4825, para. 228.

[46] *See id.* at 4931, Appx. B Sec. IV.B.

pricing."[47] While ITTA would urge that UNE-based provisioning disappear, to the extent incumbent LECs remain under a regulatory obligation to offer UNEs, UNE-based competition should count as part of the business data services product market.

4. Two Actual or Potential Competitors in a Market are Sufficient for a Finding of Competitiveness

Analyzing the underlying data, the Commission found that, when counting fiber, DOCSIS 3.0 over hybrid-fiber coaxial (HFC), and UNE supply as forms of competition, nearly 90 percent of unique locations with business data services demand are supplied by two or more providers.[48] Dr. Rysman, focusing mainly on legacy DS1 and DS3 services and hardly accounting for the explosive growth of other forms of supply, concluded that "[f]or census tract fixed effects, the [price] effect of one [additional] competitor is negative and significant."[49] The Commission should deem a business data services market competitive when there are two actual or potential providers.

Of course, competitive LECs are bound to continue to argue self-servingly that there must be at least four providers for a market to be competitive.[50] Setting the necessary level of market participation at four or more providers, however, virtually guarantees that the business data services market will *never* be subject to effective competition. It simply is not reasonable or necessary to expect that the market would consistently support four providers with last-mile

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[47] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, 20 FCC Rcd 2533, 2574, para. 65 (2005).

[48] *FNPRM*, 31 FCC Rcd at 4820, para. 219; *see also id.* at 4821, Tbl. 4.

[49] *Id.* at 4794, para. 165; *see also id.* at 4942, Appx. B Sec. IV.C.

[50] *See, e.g.*, Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, WC Docket No. 05-25, RM-10593, at paras. 57-58, 63 (filed Apr. 14, 2016).

facilities in every geographic market when the provision of broadband services, particularly over wireline facilities, requires such significant investment in network infrastructure to reach the last mile. Not surprisingly, according to a competitive LEC analysis, only three percent of buildings nationwide have three or more competitors.[51]

Importantly, in an analogous setting with significant upfront and comparatively low marginal costs – the cable context – only two providers are necessary to establish effective competition. Under the 1992 Cable Act, a cable operator can obtain relief from rate regulation when it faces competition from a DBS provider, a municipal system, or a local exchange carrier.[52] There is no justification for the application of a different standard here.

Finally, a finding that a market is competitive with two actual or potential providers is *not* precluded by the *Qwest Phoenix Order*.[53] The language of the *FNPRM* tacitly suggests that a duopoly market will never be sufficiently competitive.[54] However, the Commission found there

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[51] Sprint Comments Attach. 1, Declaration of Stanley M. Besen and Bridger M. Mitchell at para. 26 (revised filed Apr. 11, 2016) (Besen/Mitchell Decl.).

[52] The 1992 Cable Act defines four types of effective competition, three of which are relevant here: (1) competing provider effective competition, which is present if the franchise area is (i) served by at least two unaffiliated MVPDs each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of household subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area; (2) municipal provider effective competition, which is present if an MVPD operated by the franchising authority offers video programming to at least 50 percent of the households in the relevant franchise area; and (3) local exchange carrier effective competition, which generally is present if a local exchange carrier or its affiliate offers video programing services that are comparable to the video programming services offered by the unaffiliated cable operator in the franchise area directly to subscribers by any means (other than direct-to-home satellite services). 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

[53] *See Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area,* Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (*Qwest Phoenix Order*).

[54] *See FNPRM*, 31 FCC Rcd at 4846, para. 294.

that in certain circumstances duopolies are competitive, and in certain circumstances more than two providers are necessary to have effective competition.[55] Consistent with Dr. Rysman's conclusions, two providers should render a business data services market competitive.

D. Except in Rare Instances, the Business Data Services Market *is* Competitive

Notwithstanding its staleness, the 2013 data collection demonstrates that the business data services marketplace is competitive and that Congress' goal in enacting the 1996 Act – to facilitate meaningful long-term competition from non-ILEC providers through deployment of their own facilities – has been met. Existing competitive providers have consolidated and grown stronger while new entrants, especially the cable operators, have stormed into the marketplace. There is every indication that the marketplace is functioning well as the industry transitions to IP-enabled platforms. A highly competitive business broadband marketplace has emerged just as Congress envisioned.

The IRW White Paper evaluated the economics of the business data services markets and, consistent with Commission and D.C. Circuit precedent, as well as the *Horizontal Merger Guidelines*, determined that incumbent LECs face competition for business data services where competitors have made sunk investments in competitive facilities. This analysis shows beyond any doubt that the business data services market is robustly competitive, especially (but not exclusively in) in those areas in which the Commission previously granted incumbent LECs Phase I and/or Phase II pricing flexibility.

Indeed, competitors have deployed sunk facilities in virtually every census block accounting for virtually all business data services demand. According to the IRW White Paper, the "results confirm that competitors have deployed competing facilities in a preponderance of

[55] *See Qwest Phoenix Order*, 25 FCC Rcd at 8637, para. 30.

the census blocks with special access demand – averaging over 95 percent – and covering more than 97 percent of all special access locations and about 99 percent of all establishments with potential demand for special access services."[56] As of 2013, competitors had deployed high-capacity facilities in **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of all census blocks in which an incumbent LEC offered business data services.[57] They had deployed facilities in **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of census blocks in MSAs in which incumbent LECs had been granted Phase I pricing flexibility, and in a comparable **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of census blocks within Phase II MSAs.[58] Even in MSAs with no pricing flexibility, competitors had deployed facilities in **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of census blocks.[59]

In fact, this analysis demonstrates that incumbent LECs are unjustifiably subject to price cap regulation in many areas. Competitive providers have deployed facilities almost ubiquitously, covering the vast majority of census blocks, even in MSAs that have not been awarded any pricing flexibility. This analysis demonstrates that the current triggers are

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[56] IRW White Paper at 16. Though the *FNPRM* suggests that the IRW White Paper does not adequately explain its underlying assumption that two providers in a market render the market competitive, *see FNPRM*, 31 FCC Rcd at 4798, para. 172, because the Commission should determine that two providers in a market are sufficient for a finding a competitiveness, *see supra* Sec. II.C.4., the Commission should accord the IRW White Paper much greater weight than it appeared to have in its *FNPRM* analysis.

[57] *See* CenturyLink Comments, WC Docket No. 05-25, RM-10593 at 2 (filed Jan. 28, 2016).

[58] *See id.*

[59] *See id.*

conservative and under-inclusive in the sense that they have not resulted in Phase II pricing flexibility in many areas where competitors have deployed extensive facilities.

In addition, with respect to high-bandwidth services -- even bereft, until recently, of critically-important cable deployment data -- the Commission still proclaims that "[e]fforts to enter and expand in markets are being made with success,"[60] "[t]he record and our data collection support the view that competition is growing,"[61] and the "great entry success story has been that of cable."[62] NCTA likewise evinces no competitive handicap and exults the competitive prowess of its members: "'Virtually any area with special access demand . . . contain[s] cable company facilities that serve, or are capable of serving, business customers.'"[63] Ironically, the Commission proclaims that recent developments in cable business data services deployment have "forced even the largest incumbent LECs to focus on maintaining market share,"[64] a defensive posture that the Commission's re-regulation proposal appears to be designed to defeat.

Competitive LECs have made significant strides in the Ethernet marketplace as well. Indeed, the second largest U.S. provider of Ethernet services is Level 3, which ranks ahead of two of the three largest ILECs – Verizon and CenturyLink.[65] Competitive LECs have deployed fiber in at least **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY**

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[60] *FNPRM*, 31 FCC Rcd at 4827, para. 232.

[61] *Id.* at 4829, para. 235.

[62] *Id.* at para. 236. The Commission also finds that for a number of years, cable business revenues have grown at a rate of 20 percent annually. *See id.* at 4830, para. 236.

[63] *Id.* at 4805, para. 189 n.485 (quoting NCTA Reply at 14).

[64] *Id.* at 4830, para. 236.

[65] Vertical Systems Group, *Mid-Year 2015 U.S. Carrier Ethernet LEADERBAORD* (Aug. 24, 2015), http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

CONFIDENTIAL] census blocks nationwide, covering approximately **[BEGIN HIGHLY CONFIDENTIAL]** ■ **[END HIGHLY CONFIDENTIAL]** percent of the U.S. population.[66] At least one competitive LEC has deployed fiber in **[BEGIN HIGHLY CONFIDENTIAL]** ■ **[END HIGHLY CONFIDENTIAL]** percent of the subset of top census blocks that comprise 80 percent of total high-capacity revenues that can be assigned to census blocks.[67] And, according to an analysis submitted by one competitive LEC, they are the sole providers of special access service in a not-insignificant 14 percent of census blocks.[68]

Consistent with the above, the Commission justifiably appears poised to concede that the market for high-bandwidth services is competitive.[69] Conversely, it asserts that "the record makes clear that the market for lower-bandwidth TDM business data services such as those currently subject to price caps is non-competitive in significant measure."[70] ITTA wholly disputes this conclusion. Except for in rare instances, such as where there is only one actual or potential provider in the market, the Commission should find that the business data services market likewise is competitive with respect to lower-bandwidth offerings.

E. If the Commission Subdivides the Product Market, it Should Only Do So with Respect to Wireless Backhaul

The various forms of business data services should be viewed as one market in light of the substitutability of many offerings, combined with differing customer needs and preferences for business-level products. That said, if the Commission must carve out any separate product

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[66] *See* Verizon Comments, WC Docket No. 05-25, RM-10593 at 45 (filed Jan. 28, 2016).

[67] *See id.* at 46.

[68] *See* Besen/Mitchell Decl. at paras. 27-28.

[69] *See FNPRM* at Sec. V.A.10. ("Evidence of Market Power in the Delivery of DS1 and DS3 Services and Lack Thereof for Higher Bandwidth Services").

[70] *FNPRM*, 31 FCC Rcd at 4861, para. 353.

market, there is one whose needs are distinct enough that the Commission could create a separate "customer class" for it: mobile wireless backhaul.[71] The Commission recognizes, for instance, that in some cases, a company's *raison d'etre* is to provide access to dark fiber, which is particularly attractive for mobile carriers needing cell site backhaul.[72] The Commission also identifies mobile wireless providers purchasing backhaul as one of merely three main categories of business data services customers,[73] and portrays an exponential increase in demand for backhaul in the coming years as mobile broadband and its attendant applications continue to mushroom.[74]

Indeed, Chairman Wheeler has consistently emphasized wireless backhaul and the transition to 5G wireless as a motivating factor for the Commission to reach a decision in this proceeding before the end of this year.[75] Furthermore, as the Commission itself observes, wireless carriers are "typically large and sophisticated buyers, with substantial capacity to leverage scale, for example, in seeking tenders to supply."[76] In light of the purchasing power of such buyers, as well the robust state of competition for higher bandwidth services as described

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[71] In the *FNPRM*, the Commission specifically inquires whether to define customer classes such as wholesale, mobile backhaul, and retail. *See FNPRM*, 31 FCC Rcd at 4844, para. 284.

[72] *See id.* at 4753, para. 67.

[73] *See id.* at 4754, para. 70.

[74] *See id.* at 4758, para. 79.

[75] *See, e.g.*, Tom Wheeler, Chairman, Fed. Communications Comm'n, The Future of Wireless: A Vision for U.S. Leadership in a 5G World, at 6 (June 20, 2016) ("Before the end of this year the Commission will take up a reform proposal . . . in Business Data Services while ensuring that lack of competition in some places cannot be used to hold 5G hostage"); *see also, e.g., FNPRM*, 31 FCC Rcd at 5000, Wheeler FNPRM Statement.

[76] *FNPRM*, 31 FCC Rcd at 4812, para. 202.

above in Section E, no additional competitive protections are warranted for wireless backhaul, should it be identified by the Commission as a separate product market.

III. A REVERSION TO PRICE CAPS, WHEREBY INCUMBENT LECS' COSTS ARE INSUFFICIENTLY RECOGNIZED, WILL HURT INCUMBENTS AND CONSUMERS ALIKE, STIFLING INNOVATION AND INVESTMENT

Where the Commission's Competitive Market Test finds a lack of competition, the Commission proposes essentially to apply the contours of Phase I pricing flexibility – namely, rates subject to price caps, but with an option to allow individually negotiated contracts.[77] ITTA realizes that the Commission may be unable to resist the temptation to impose some price regulation in the instances where it concludes a market is not competitive, notwithstanding the burgeoning growth of packet-based business data services, especially cable Ethernet. However, as discussed above in Section II.D., ITTA disputes the Commission's conclusion that there is a significant lack of competition with respect to lower-bandwidth TDM business data services.

A. The Commission's Proposal to Apply a Productivity Factor Ignores Incumbent LECs' Real Costs

The FNPRM proposes to incorporate a productivity factor into its price cap framework for business data services on a going-forward basis.[78] It also asks whether the Commission should make any adjustments to current price caps to reflect any past productivity gains not taken into account before.[79] Underlying these proposals, the Commission explains that "the price cap indices provide benchmarks of price cap LEC cost changes that encourage them to become more productive and innovative by permitting them to retain reasonably higher earnings. Those indices are designed to limit the prices price cap LECs charge for service to just and

[77] *See id.* at 4904, para. 501.

[78] *See id.* at 4866, para. 364.

[79] *See id.*

reasonable levels."[80] Adoption of these productivity factor proposals would frustrate the designs of imposing price caps.

With respect to its goals in proposing to apply a productivity factor, the Commission states the following assumption: "Given the rapid growth in business data services output, and the ever-increasing economies of scale with respect to providing business data services, per unit costs likely have decreased significantly since that time."[81] That assumption, however, is erroneous. As growth in high-bandwidth business data services has exploded in the last few years, the shift of demand away from lower-bandwidth TDM services has accelerated.[82] Consequently, even if one was to assume arguendo that incumbent LEC productivity has gone up with respect to business data services – an assumption ITTA does *not* concede – declining utilization of incumbent LEC TDM plant used for such services would more than offset any purported productivity gains.[83]

In fact, incumbent LEC business data services costs have not gone down at all. Costs for labor, maintenance and repair, rights of way, and even trenching where necessary have only increased in the face of declining utilization of incumbent LEC TDM plant. In addition, to the extent incumbent LECs seek to scale TDM services to approximate Ethernet service offerings, as

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[80] *Id.* at 4862, para. 353.

[81] *Id.* at 4866, para. 365.

[82] *See id.* at 4759, para. 81; *see also id.* at 4805, para. 189 ("increasingly business customers purchase [IP-based] technologies instead of TDM services").

[83] The Gartner Group "'estimates that enterprise spending over the 2014-2019 period on [TDM] leased lines will decline by 18.6% annually so that leased lines will amount to only $3 billion or 6% of enterprise spending by 2019.'" *Id.* at 4759, para. 81 (quoting Anna-Maria Kovacs, *Regulation in Translation, Business Broadband: Assessing the Case for Reregulation* at 10 (Mar. 2016), http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Regulation%20in%20Financial%20Transaction%20Business%20Broadband%20Assessing%20the%20Case%20for%20Reregulation%20Kovacs%203.14.16.pdf).

the Commission demonstrates, their costs of doing so can exceed Ethernet costs by a factor of three or more.[84] Such increases in per-unit costs have not been offset by exogenous cost adjustments, which are generally those triggered by administrative, legislative, or judicial action beyond the control of carriers.[85] While price cap regulation "is intended to . . . permit[] incumbent LECs that increase their productivity to earn higher profits,"[86] incumbent LECs have little control over the aforementioned costs, so imposing a productivity factor that does not necessarily reflect incumbent LECs' own productivity threatens to defeat the purpose of price cap regulation to begin with which, aside from incentivizing productivity, is also "to ensure that '[b]oth carriers and customers will be better off' under price cap regulation."[87]

Furthermore, even if incumbent LECs' actual productivity does approximate whatever factor the Commission ultimately may decide upon, application of such a productivity factor actually undermines incumbent LECs' incentive to become more efficient, invest, and innovate. As Judge Williams eloquently wrote recently in his partial dissent in *USTelecom v. FCC*,[88] "[s]uch regulation dulls incentives by telling the regulated firm that if it makes some advance cutting its costs of service, the regulator will promptly step in and snatch away any profits . . . .

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[84] *Id.* at 4759, Fig. 7 ("Chart comparing Ethernet and TDM pricing by bandwidth"); *see also id.* at 4809, para. 198 n.513 ("MegaPath, for example, notes that 'Business Ethernet is also easier, faster, and less expensive to scale than a T1 line – usually without the need to change equipment.'") (citing MegaPath, Why Businesses Choose Ethernet Over T1, https://www.megapath.com/data/ethernet/comparison/).

[85] *See id.* at 4863, para. 356; *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6807, para. 166 (1990).

[86] *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd 16642, 16645, para. 2 (1997).

[87] *Id.*

[88] *USTelecom v. FCC*, No. 15-1063 (D.C. Cir. June 14, 2016) (Williams, SCJ., concurring in part and dissenting in part).

[T]he regulatory process overall limits the incentive to innovate."[89] Ironically, Judge Williams was discussing rate-of-return regulation, but his reasoning fits perfectly here with respect to the Commission's productivity factor proposal.

As for the Commission's question whether it should make any adjustments to current price caps to reflect any past productivity gains not taken into account before, the answer is a resounding no. Even if, assuming arguendo – again, which ITTA does not concede – actual incumbent LEC efficiency gains did match whatever measures the Commission were to concoct, reaching back to adjust current price caps to account for such gains would have the effect of punishing incumbent LECs for such efficiency, and smacks of an impermissible taking.

In sum, ITTA urges that the productivity factor continue to track inflation, as it has for over a decade.[90]

Finally, ITTA recognizes that one of the Commission's primary goals in this proceeding is to "remove barriers that may be inhibiting the technology transitions."[91] Nevertheless, it would be highly cynical, if not altogether Machiavellian, for the Commission to leverage intrusive price cap regulation to prematurely force incumbent LECs to abandon their sunk legacy investment in order to migrate to new technologies.[92]

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[89] *Id.* at 54-55.

[90] *See* AT&T Reply Comments, WC Docket No. 05-25, RM-10593 at 34-36 (filed Feb. 19, 2016) (AT&T Reply) for additional discussion of why establishing a new productivity factor would be a hopeless frolic and detour.

[91] *FNPRM*, 31 FCC Rcd at 4726, para. 7.

[92] *Cf. id.*, 31 FCC Rcd at 4882, para. 423 (relying on regulated TDM service prices to anchor the prices of packet-based services "may create incentives at odds with our goal of facilitating the technology transitions").

B. Increasing Price Cap Regulation of TDM Business Data Services Counters the Commission's Technology-Neutral Framework Goal, and Will Have the Effect of Inhibiting Technology Transitions

At the beginning of the *FNPRM*, the Commission clearly delineates four "fundamental principles" upon which it proposes that "a new regulatory framework" be built.[93] In describing the third, the Commission states that its proposal "is designed . . . to remove barriers that may inhibit migration away from TDM to encourage the migration to new technologies."[94] As discussed above, the Commission finds that newer, higher-bandwidth business data services are competitive, but that legacy services are not.

Regulation comes with a price. To begin with, reinstituting price cap regulation inevitably will lead to new price cap regulation for some incumbent LEC offerings currently subject to Phase II pricing flexibility. The Commission also recognizes that "any price regulation where the Commission would be establishing rates for carriers to charge (even for just one service) would still add reporting and monitoring burdens on carriers, which could inhibit innovation."[95] Just as the Commission expresses "hesitation"[96] to bring packet-based services under price cap regulation in part due to such burdens, it should likewise decline to apply such regulation to TDM services.

Not only would the regulatory imbalance run counter to the second of the four fundamental principles enunciated for this proceeding – that "the new regulatory framework

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[93] *Id.* at 4725, para. 4.

[94] *Id.* at 4726, para. 7.

[95] *Id.* at 4882, para. 423.

[96] *Id.*

should be technology-neutral"[97] – but in light of such burdens, subjecting TDM services to price cap regulation may have the ironic effect of depriving incumbent LECs of the very resources they need to invest in future technologies. Similarly, to the extent the Commission in this proceeding seeks to ensure "that lack of competition does not unfairly harm commercial customers or the consumers who rely upon them,"[98] imposing price cap regulation even on TDM services could ironically lead to inhibiting incumbent LEC investment in new technologies, to the detriment of commercial customers and the consumers who rely upon them.

IV. CONCLUSION

In sum, the Commission should revamp its competition market analysis in light of critical cable deployment data only recently entered into the record, finding that the reality of current marketplace conditions is that almost all business data services markets are competitive. Even in those limited markets then deemed non-competitive, the Commission should resist the urge to reimpose price cap regulation, as such regulation, paradoxically, will harm business data services customers, and hinder investment and innovation.

Respectfully submitted,

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[97] *Id.* at 4726, para. 6.

[98] *Id.* at para. 9.